

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Donald S. Owens, Joel P. Hoekstra, and Helene N. White, JJ

**UNITED STATES FIDELITY INSURANCE
& GUARANTY COMPANY,**

Plaintiff-Appellee,

v

Docket No. 133466

**MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION,**

Defendant-Appellant,

and

**MICHAEL MIGDAL, Individually and as
Conservator of the Estate of DANIEL MIGDAL,
a Protected Person,**

Defendant.

BRIEF ON APPEAL – AMICUS CURIAE
INSURANCE INSTITUTE OF MICHIGAN

PROOF OF SERVICE

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STATEMENT OF THE BASIS OF JURISDICTION

This Court has discretionary by-leave jurisdiction to review a decision of the Court of Appeals. MCR 7.301(A)(2). The Michigan Catastrophic Claims Association (“MCCA”) timely applied to this Court for leave to appeal from the Court of Appeals’ February 6, 2007, published opinion in this matter. United States Fidelity Ins & Guar Co v Mich Catastrophic Claims Ass’n, 274 Mich App 184; 731 NW2d 481 (2007). By order dated May 16, 2008, this Court granted the MCCA’s application.

STATEMENT OF QUESTION PRESENTED

- I. IS THE MCCA STATUTORILY REQUIRED TO AUTOMATICALLY REIMBURSE ITS MEMBER-INSURERS, SUCH AS PLAINTIFF USF & G, FOR ALL EXCESS NO-FAULT PIP BENEFIT PAYMENTS, WITHOUT REGARD TO WHETHER THE PAYMENT AMOUNTS SUBMITTED FOR REIMBURSEMENT ARE “REASONABLE”?

The trial court answered, “Yes.”

The Court of Appeals answered, “Yes.”

Plaintiff-Appellee USF & G answers, “Yes.”

Defendant-Appellant MCCA answers, “No.”

Amicus curiae IIM answers, “No.”

STATEMENT OF INTEREST OF AMICUS CURIAE
INSURANCE INSTITUTE OF MICHIGAN

Presently pending before this Court in Docket No. 133466 is the Michigan Catastrophic Claims Association's (MCCA's) appeal from the Court of Appeals decision in this case, United States Fidelity Ins & Guar Co v Mich Catastrophic Claims Ass'n, 274 Mich App 184; 731 NW2d 481 (2007), lv gtd 481 Mich 862; 748 NW2d 240 (2008). Also pending in Docket No.133468 is the MCCA's appeal in Hartford Ins Co of the Midwest v Mich Catastrophic Claims Ass'n. Both cases were consolidated in the Court of Appeals and decided by the same Court of Appeals opinion, supra. Both cases and MCCA appeals involve the same basic issue.

The basic issue in this USF & G case, or these cases, is whether the MCCA has the right/duty to review for reasonableness the over-statutory-threshold no-fault personal protection insurance (PIP) benefit reimbursement claims of MCCA member insurers, or the MCCA has no such right/duty and is nothing more than a strictly liable, rubber-stamp, discretionless, check-writing entity that is required to automatically indemnify a member insurance company for all no-fault PIP benefits paid to the member's insured, without regard to whether the amounts paid are reasonable.

The Court of Appeals ruled in favor of the latter position, thereby ruling against the MCCA's longstanding practice and view of its statutory role in the no-fault system.

The Insurance Institute of Michigan ("IIM") believes that this issue is obviously a very important, jurisprudentially significant issue of statutory construction, and that the

issue was incorrectly decided by the Court of Appeals. The issue was decided by the Court of Appeals as a matter of first impression in a published opinion, supra. The Court of Appeals opinion reversed what has been the claims-handling procedure of the MCCA since its inception (1978). The Court of Appeals expressly rejected/overruled the MCCA's own view of its statutory role, the pertinent applicable provisions of the MCCA's statutorily-authorized Plan of Operation, and the OFIR's view of the MCCA's statutory role. Any Court of Appeals opinion that could do all of that is obviously extremely significant.

The implications of an automatic reimbursement rule, with no discretion to be exercised by the MCCA and with no accountability by the member insurer regarding the reasonableness of the PIP benefits paid and loss claimed, are enormous not merely for the MCCA but for all no-fault insurers and insureds who ultimately pay the bill paid by the MCCA.

The IIM agrees with the MCCA's principal and reply briefs and their identification or characterization of the various problems with the Court of Appeals' opinion. Most significant is the Court of Appeals' erroneous reading of MCL 500.3104 in isolation and in disregard of the implicitly if not explicitly cross-referenced MCL 500.3107(1)(a) no-fault PIP coverage reasonableness requirement. That statutory construction error led to the Court of Appeals erroneously and abruptly discarding, without any appropriate deference whatsoever, the longstanding practice and Plan of Operation of the MCCA as

approved by the OFIR. The Court of Appeals also erred in concluding that the statutory right of the MCCA to intervene in the claims-handling procedures of a member insurer (i.e., basically, the right to put a no-fault insurer's claims-handling procedures in MCCA receivership) is the exclusive remedy for the problem in this case (an unreasonable settlement by a member insurer with its insured PIP-claimant). Not only is there no statutory language to suggest that this is the exclusive remedy for, or answer to, an "unreasonable" claim, that remedy could only be a possible remedy for future claims and is no remedy whatsoever for an already unreasonably settled/adjusted claim such as in the instant case.

Amicus IIM is a government affairs and public information association. It represents more than 90 property/casualty insurance companies and related organizations operating in Michigan. IIM member companies provide insurance to 73% of the Michigan automobile market.

The IIM's purpose is to serve the Michigan insurance industry and the insurance consumer as a central focal point for educational, media, legislative and public information on insurance issues. In effect, the IIM serves as the official spokesperson for the property/casualty insurance industry in Michigan.

Consistent with its purpose, the IIM has an obvious interest in the correct construction and application of statutes pertaining to insurance, such as the statutes at issue in this case.

STATEMENT OF FACTS

Amicus Curiae IIM agrees with and adopts the Statement of Facts contained in Defendant-Appellant MCCA's Brief on Appeal. Consistent with the trial court's disposition of this matter pursuant to the parties' cross-motions for summary disposition, and the Court of Appeals' affirmance of the trial court's decision, the facts pertinent to this appellate matter are not in dispute.

ARGUMENT

I. CONTRARY TO THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS IN THIS MATTER, THE MCCA IS NOT STATUTORILY REQUIRED TO AUTOMATICALLY REIMBURSE ITS MEMBER INSURERS, SUCH AS PLAINTIFF USF & G, FOR ALL EXCESS NO-FAULT PIP BENEFIT PAYMENTS, WITHOUT REGARD TO WHETHER THE PAYMENT AMOUNTS SUBMITTED FOR REIMBURSEMENT ARE “REASONABLE.”

Amicus Curiae IIM agrees with and adopts the various arguments set forth in Defendant-Appellant MCCA’s Brief on Appeal and Reply Brief. Amicus IIM will make an effort to not simply repeat those arguments herein.

A. Introduction – nature of the issue

This is a no-fault automobile insurance declaratory action. Plaintiff-Appellee USF & G brought this action to determine its rights and obligations with regard to Defendant Migdal and Defendant-Appellant MCCA.

This action arises out of an August 22, 1981, motor vehicle accident which left the then 17-year-old Daniel Migdal catastrophically injured and in need of, inter alia, 24/7 attendant care. Plaintiff USF & G is Daniel Migdal’s no-fault insurer, responsible by law and contract with furnishing Mr. Migdal’s MCL 500.3107 no-fault personal protection insurance (PIP) benefits. USF & G is solely responsible for the first \$250,000.00 in PIP benefits. MCL 500.3104(2)(a). Once that threshold amount was satisfied, USF & G could and did request reimbursement of any further PIP benefit payments from Defendant

MCCA, an unincorporated, non-profit association of which USF & G is, by law, a member-insurer. MCL 500.3104(1).

The specific controversy in this case arises out of a previous settlement agreement between Plaintiff USF & G and Defendant Migdal. During the long PIP benefit relationship, from 1981 to date, between insurer USF & G and insured Migdal, a disagreement arose back in 1988 over the attendant care PIP benefits to which Mr. Migdal was entitled. The Migdal claim was litigated and was eventually resolved by a settlement agreement and February 12, 1990 consent judgment. Pursuant to the agreement, Defendant Migdal received: \$35,000.00 for past attendant care; 24/7 attendant care from and after January 25, 1989, at the rate of \$17.50/hour; and an annual increase in the hourly attendant care rate, supra, of 8.5% compounded. The net effect of this agreement, entered more than 15 years ago, is that Defendant Migdal presently receives 24/7 attendant care benefits at the rate of \$82.44/hour, or \$722,174.00 per year. In other words, the attendant care hourly rate agreed to in 1990 has almost quintupled or grown exponentially pursuant to the annual-increase provision of the agreement, and that rate is continuing to grow, out of control.

This agreed-upon multiplication of the attendant care hourly rate – without regard to actual cost, rate of inflation, any controls, etc. – spawned the instant case. Plaintiff USF & G, after paying the agreed-upon sums, applied to Defendant MCCA for reimbursement. The MCCA reviewed the paid attendant care amounts for

reasonableness, found them unreasonable, and reimbursed USF & G for only the amounts deemed reasonable by the MCCA. USF & G then brought the instant dec-action seeking either reformation of its settlement agreement with Defendant Migdal or full dollar-for-dollar reimbursement from the MCCA without regard to the reasonableness of the expenses sought to be reimbursed.

Pursuant to the parties' cross-motions for summary disposition, the trial court, Oakland County Circuit Court Judge Steven Andrews, denied reformation of the settlement agreement but granted USF & G, without regard to reasonableness, the full reimbursement it sought from the MCCA. Judge Andrews expressly and repeatedly held that the MCCA's statutory reimbursement obligation was automatic – i.e., without regard to the reasonableness of the amounts submitted for reimbursement.

The MCCA appealed of right to the Court of Appeals which, in a published opinion released February 6, 2007, affirmed the trial court's automatic MCCA reimbursement rule.

By order dated May 16, 2008, this Court granted the MCCA's application for leave to appeal in this case as well as in the companion MCCA reimbursement case that involved the same issue and that was simultaneously decided by the Court of Appeals opinion in this case, supra.

The net effect of the Court of Appeals opinion is that the MCCA is a discretionless, strictly liable, rubber-stamping, bill-paying entity, that is just there to

reimburse its members once the threshold is satisfied – any excess PIP benefit paid by a member is a pass-through to the MCCA for automatic reimbursement without review for reasonableness.

Accordingly, the issue before this Court is not the reasonableness of the settlement agreement between Plaintiff-Appellee USF & G and Defendant Migdal. There is probably no one at this point who could convincingly argue that it is “reasonable.” Certainly, Plaintiff-Appellee USF & G realizes that the out-of-control agreement it negotiated with Defendant Migdal is unreasonable – that is precisely why USF & G sought in this case, albeit unsuccessfully, to reform the agreement.

Instead, the issue is whether the trial court and Court of Appeals erred in their summary disposition determination that Defendant-Appellant MCCA has no power to review for reasonableness, and must simply pay, without regard to reasonableness, the no-fault PIP benefit amounts paid and passed along to it, for reimbursement, by its member-insurers such as USF & G.

B. Standard of Review

There should be no dispute that the trial court and Court of Appeals decisions in this matter are subject to de novo review by this Court for legal error.

The de novo standard is the applicable standard of review because the underlying order being appealed is one of summary disposition, Maiden v Rozwood, 461 Mich 109, 118-121; 597 NW2d 817 (1999), and because the issue on appeal is a purely legal issue of

no-fault statutory construction, Kreiner v Fischer, 471 Mich 109, 129; 683 NW2d 611 (2004).

C. Analysis

The MCCA no-fault PIP benefit reimbursement issue in this case involves the interplay of, primarily, two provisions of the No-Fault Act, MCL 500.3101, et seq.

First of all, MCL 500.3107(1)(a) requires the responsible no-fault insurer (here, USF & G) to pay to or on behalf of its no-fault insured (here, Daniel Migdal) the following “allowable expense” medical PIP benefits:

- “(1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
 - (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than \$1,750.00 or more than \$5,000.00.”

We know from the above-quoted statutory language and well-established Michigan case law that, in order for the no-fault insurer to be obligated by § 3107(1)(a) to pay, the claimed expense item must be (1) “reasonable” as to amount; (2) “reasonably necessary”;

(3) actually “incurred”; and (4) motor-vehicle accident-related. Nasser v Auto Club Ins Ass’n, 435 Mich 33, 49-50; 457 NW2d 637 (1990); SPECT Imaging, Inc v Allstate Ins Co, 246 Mich App 568, 574; 633 NW2d 461 (2001); Anton v State Farm Mut Automobile Ins Co, 238 Mich App 673; 607 NW2d 123 (1999); Dengler v State Farm Mut Ins Co, 135 Mich App 645, 648-649; 354 NW2d 294 (1984).

We also know that, assuming the above criteria are met, the “attendant care” benefits involved in this case are a traditional or established type of § 3107(1)(a) allowable expense PIP benefits. See, e.g., Attard v Citizens Ins Co, 237 Mich App 311, 317-318; 602 NW2d 633 (1999).

Therefore, considering only what is in dispute in this particular case, Plaintiff-Appellee USF & G was not obligated to pay § 3107(1)(a) attendant care PIP benefits to Defendant Migdal unless the claimed attendant care charges were reasonable in amount.

Indeed, considering that one of the principal purposes of the No-Fault Act is to provide no-fault insurance benefits to compensate for certain economic losses at the least expensive adequate amount so that no-fault insurance premiums remain as affordable as possible, Kitchen v State Farm Ins Co, 202 Mich App 55, 58; 507 NW2d 781 (1993), lv den 447 Mich 862; 530 NW2d 484 (1994), Plaintiff-Appellee USF & G would not be acting responsibly or in its premium-paying-insureds’ best interests if it did not review the claimed attendant care charges for reasonableness and pay only amounts that are reasonable.

Secondly, MCL 500.3104 requires the MCCA to reimburse its member-insurers (like USF & G) for all PIP benefit amounts that they are obligated to pay in excess of the statutory (here \$250,000.00) threshold amount:

“(2) The association shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence:

(a) For a motor vehicle accident policy issued or renewed before July 1, 2002, \$250,000.00.

* * *

(25) As used in this section:

* * *

(c) ‘Ultimate loss’ means the actual loss amounts that a member is obligated to pay and that are paid or payable by the member, and do not include claim expenses. An ultimate loss is incurred by the association on the date that the loss occurs.”

MCL 500.3104(2), (25) [emphasis added].

The above-quoted and emphasized § 3104 statutory language expressly ties the MCCA’s § 3104 reimbursement obligation to § 3107 PIP benefits that the member insurer is “obligated to pay.”

If we apply the two pertinent statutes – i.e., §§ 3104 and 3107, supra – together, it is clear that the MCCA’s reimbursement obligation is only with respect to PIP benefit

payments that are reasonable. MCL 500.3107(1)(a) expressly obligates a no-fault insurer (here, USF & G) to pay only reasonable PIP charges. MCL 500.3104(2), (25), in turn, expressly obligates the MCCA to reimburse only the excess PIP charges that the no-fault insurer is obligated to pay. Hence, the MCCA reimbursement obligation is only with regard to reasonable, not all or unreasonable, PIP charges.

Given all of the rules of statutory construction cited and explained in all of the briefs filed in this matter, the IIM agrees with the MCCA that there is no reason not to read the foregoing no-fault statutory provisions together, in harmony, and in precisely the fashion set forth, supra.

While there is no dispute in this case that these two statutory provisions, supra, are intertwined or tie-barred, there is a very sharp and significant dispute over how to interpret or apply them together.

The MCCA maintains that, pursuant to the foregoing analysis, it has the § 3104 statutory right, if not the duty, to review the PIP reimbursement claims submitted to it by its member insurers and to reimburse only those member § 3107 PIP payments that are, inter alia, reasonable.

USF & G, however, maintains that the statutory scheme, supra, provides for no such discretionary review by the MCCA. According to USF & G, it doesn't matter whether the PIP payments for which it is seeking MCCA reimbursement are "reasonable" or wildly unreasonable on their face, the MCCA has a statutory duty to automatically

reimburse those member PIP payments, without blinking, if the member is, for any reason, “obligated” to make the payment. According to USF & G, it can obligate itself by reaching a settlement agreement, embodied in a consent judgment, with its insured to pay PIP benefits in an unreasonable amount, and the MCCA has no choice but to reimburse USF & G for any such PIP benefit payments that are in excess of the (\$250,000.00) MCCA threshold.

The Court of Appeals decided this controversial issue, as a matter of first-impression statutory construction, in the published and therefore precedentially binding¹ opinion that it issued in this case. United States Fidelity Ins & Guar Co v Mich Catastrophic Claims Ass’n, 274 Mich App 184; 731 NW2d 481 (2007), lv gtd 481 Mich 862; 748 NW2d 240 (2008).

In sum, the Court of Appeals adopted the USF & G view that § 3104 sets forth an automatic reimbursement rule – i.e., the MCCA must automatically reimburse any over-threshold PIP payment, reasonable or unreasonable, if the member insurer is obligated for any reason to make the payment:

“The MCCA argues that MCL 500.3104 only requires it to reimburse insurers for the *reasonable* costs of PIP benefits paid by insurers in excess of the statutory threshold. We hold that MCL 500.3104 does not incorporate a “reasonableness” requirement and requires the MCCA to reimburse insurers for the *actual* amount of PIP benefits paid in excess of the statutory threshold. In other words, the MCCA is statutorily

¹ MCR 7.215(C)(2), (J)(1).

required to reimburse an insurer for 100 percent of the amount that the insurer paid in PIP benefits to an insured in excess of the statutory threshold listed in MCL 500.3104(2), regardless of the reasonableness of these payments.”

USF & G, supra, 274 Mich App, at 192 (emphasis added).

“Instead, by requiring the MCCA to reimburse an insurer for the amount that the insurer, in turn, is obligated to pay in PIP benefits, MCL 500.3104 requires the MCCA to reimburse the insurer for the full amount (above the statutory threshold) of PIP benefits that the insurer is bound to pay to its insured, regardless of the circumstances under which that amount was determined, whether by agreement, judgment, binding arbitration, or otherwise, or the reasonableness of that amount. The MCCA’s reimbursement obligation is reemphasized in MCL 500.3104(7)(a), which provides that ‘[t]he association shall . . . [a]ssume 100% of all liability as provided in [MCL 500.3104(2)].’ Consequently, MCL 500.3104 provides that the MCCA must indemnify an insurer for 100 percent of the actual loss amounts (above the statutory threshold established in MCL 500.3104(2)) that the insurer is obligated to pay in PIP coverages, regardless of the reasonableness of these payments.”

USF & G, supra, 274 Mich App, at 197-198 (footnote omitted; emphasis added).

The IIM agrees with the MCCA’s briefed position that the Court of Appeals opinion in this matter is erroneous. As demonstrated supra, the no-fault statutory scheme does not set forth an MCCA automatic reimbursement rule.

The IIM believes that the fundamental problem with the Court of Appeals analysis is three-fold.

First, the Court of Appeals appears to perform the same statutory analysis as the MCCA. The Court agrees that the pertinent at-issue no-fault statutory provisions are §§

3104 and 3107, that they must be read together, and that § 3104 refers to and incorporates the personal protection insurance coverage provision, § 3107. But then the Court concludes that, because § 3104 does not expressly state a reasonableness requirement, there is no reasonableness requirement in the § 3104 MCCA reimbursement provision. The IIM believes that it is fundamentally illogical and unjustifiable to, on the one hand, recognize the explicit interplay of §§ 3104 and 3107, but, on the other hand, conclude that none of the undisputed several requirements, supra, of § 3107(1)(a) are incorporated into § 3104 because they are not stated or, more accurately, restated therein. While purporting to faithfully refuse to read a reasonableness requirement into § 3104, the Court is in fact erroneously reading the reasonableness and every other § 3107(1)(a) requirement out of § 3104 which incorporates § 3107.

Second, the Court of Appeals is fundamentally mistaken regarding its interpretation of the § 3104 language regarding what it is that a member insurer is “obligated to pay” and therefore the MCCA is required to reimburse:

“The MCCA and amicus curiae Auto Club Insurance Association argue that the MCCA should not be required to reimburse an insurer for unreasonable payments incurred by the insurer pursuant to a settlement agreement or a consent judgment. Yet although it may be more appealing to argue that the MCCA should not be liable for unreasonable payments that an insurer has voluntarily incurred pursuant to an agreement, nothing in the language of MCL 500.3104 supports this distinction. Rather, by its plain terms, MCL 500.3104 applies to all actual loss amounts that an insurer is obligated to pay above the statutory threshold, regardless of the source of the obligation. There is no language in MCL

500.3104 that supports distinguishing among a settlement agreement, a judgment, a binding arbitration award, or any other payment that an insurer is legally required to make, even if the amount is, or later becomes, unreasonable. To the contrary, the proposed distinction permitting the MCCA to forgo reimbursing insurers for unreasonable payments negotiated pursuant to certain settlement and resolution procedures would ignore the plain meaning of ‘obligate’ included in the definition of ‘ultimate loss’ in MCL 3104(25)(c).”

USF & G, supra, 274 Mich App, at 198-199 (footnote omitted; emphasis added).

Contrary to the Court of Appeals’ conclusion, supra, the § 3104 obligation language does not refer to just any obligation (“regardless of the source”) that may encumber the member no-fault insurer. As analyzed supra, the insurer obligation referred to in § 3104 is the § 3107 obligation to pay the (reasonable, reasonably necessary, incurred, and accident-related) charges or PIP benefits that the insured is statutorily and contractually entitled to.

The § 3104 obligation language is not a reference to what the insurer itself or someone else deems the insurer obligated to pay; that determination may or may not be, or coincide with, the insurer’s § 3107 PIP obligation. How do we know this? A no-fault insurer’s PIP obligation exists irrespective of litigation. A no-fault PIP benefit claim does not have to be disputed, litigated, tried, arbitrated, or settled, as here, into a consent judgment. Indeed, the no-fault statutory vision is that benefits be determined and paid promptly and that litigation be minimized.

The insurer obligation referred to in § 3104 is the basic § 3107 PIP obligation

incorporated by reference into § 3104 and common to all valid PIP claims, not just litigated or disputed ones. Moreover, it is particularly inappropriate to equate the basic § 3104 obligation language to the obligation arising, as here, from a settlement agreement where the “obligation” is self-imposed. In that situation, the use of the word “obligated” is a play on words and a misuse of the word “obligated,” distorting it to cover voluntary or gratuitous payment agreements and conflicting with the statutory intent that only reasonable PIP expenses are required to be paid.

Third, the Court of Appeals justifies the reduction of § 3104 to an automatic reimbursement rule by erroneously concluding that the Legislature provided the MCCA with a different and exclusive remedy for avoiding having to reimburse member insurers for unreasonable or improper PIP payments:

“The MCCA and amici curiae Auto Club Insurance Association and Insurance Institute of Michigan argue that an insurer that has reached the statutory threshold might approve *all* claims, no matter how unreasonable, secure in the knowledge that it will be fully reimbursed by the MCCA. However, our Legislature recognized the possibility that insurers might take inadequate steps to insure that their review and settlement of catastrophic claims was reasonable and provided a remedy. MCL 500.3104(7)(g) provides that the MCCA shall do the following on behalf of its member insurers:

‘Establish procedures for reviewing claims procedures and practices of members of the association. If the claims procedures or practices of a member are considered inadequate to properly service the liabilities of the association, the association may undertake

or may contract with another person, including another member, to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member.’

MCL 500.3104(7)(g) permits the MCCA to review its members’ claims-handling procedures and to intervene if it believes that those procedures are ‘inadequate to properly service the liabilities of the association . . .’ Thus, if an insurer stops reviewing claims for reasonableness when it reaches the statutory threshold, it runs the risk that the MCCA ‘may undertake or may contract with another person, including another member, to adjust or assist in the adjustment of claims for the member on claims that create a potential liability to the association and may charge the cost of the adjustment to the member,’ as permitted by MCL 500.3104(7)(g). MCL 500.3104 does not authorize the MCCA to undertake any other sanctions.”

USF & G, supra, 274 Mich App, at 199-200 (footnote omitted; emphasis added).

The IIM agrees with the MCCA that there is no statutory support for the Court of Appeals’ above-quoted exclusive remedy holding, that § 3104 provides the MCCA with broad powers, that there is nothing inconsistent with the MCCA exercising any and all powers, and that there is no indication that the MCCA failed to do anything that it was required to do or that would negate its right to properly carry out its statutory reimbursement functions.

Like the MCCA, the IIM is at a loss to understand how the allegedly exclusive statutory remedy found and relied on by the Court of Appeals would have any logical relationship to the problem posed by this case.

The Court of Appeals relies on the statutory power of the MCCA to put a member insurer into a kind of claims-handling receivership – i.e., to deem an insurer's claim-handling procedures inadequate and, on that basis, to intervene in and take over an insurer's handling of its claims, all at the expense of the member insurer.

The MCCA is not alleging, and USF & G is certainly not arguing, that the USF & G claims-handling procedures are inadequate or incompetent. Apparently, neither entity would like or argue for the MCCA intrusion into USF & G's affairs that is suggested by the Court of Appeals opinion. The claim here is that USF & G simply entered into a patently unreasonable settlement – a singular mistake that USF & G must pay for, not the MCCA. And even if that mistake were now deemed to also justify MCCA intervention, per § 3104(7)(g), how would that future intervention be a remedy for the past problem/mistake that is this case?

The result of the automatic MCCA reimbursement rule now installed by the Court of Appeals opinion in this case is that any PIP payment amount, no matter how ridiculous or unreasonable, can simply be passed along by the member insurer to MCCA for reimbursement, without recourse, without review for reasonableness, and for strict-liability rubber-stamp payment. This would mean suspension of § 3107 requirements in § 3104 situations. That makes no sense, and there is no statutory support for that.

In addition to standing the statutory language on its ear, the strict, no-scrutiny MCCA payment now required by the Court of Appeals would directly contradict: the

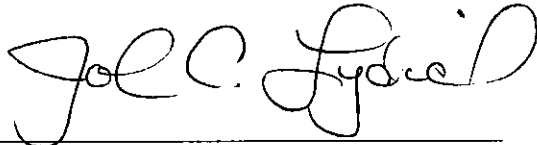
MCCA's practice from its inception to the present date; the insurance commissioner and OFIR executive agency understandings of the MCCA function; and the very charter or plan of operation of the MCCA which is expressly incorporated into, and therefore statutorily enforced by, MCL 500.3104(1) and (18)-(20). These additional points are well-briefed by the MCCA, and those arguments are adopted without embellishment here.

It is the position of the IIM that the MCCA reimbursement system should be fair both for the MCCA and for all of its member insurers. The IIM well appreciates that an insurance company does not want to make a PIP benefit payment only to have it second-guessed for reasonableness and rejected by the MCCA. The MCCA knows that, as does the IIM. The MCCA concedes that, in a typical case, the bills are routinely paid/reimbursed. But that is a far cry from rubber-stamp non-review and simply passing mistakes along from no-fault insurer to MCCA without review and accountability. If anything, the legislative scheme indicates that it is a two-way street, with the MCCA being able to sue and be sued. MCL 500.3104(8)(a). If a member disagrees with the reasonableness-determination of the MCCA, the member can sue the MCCA, as here, and, as the MCCA concedes, the issue of reasonableness may ultimately be a question of fact per Nasser v Auto Club Ins Ass'n, supra.

RELIEF

For all of the foregoing reasons, Amicus IIM requests that this Honorable Court reverse the judgment of the Court of Appeals in this matter and grant the relief requested by the MCCA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John A. Lydick", written over a horizontal line.

JOHN A. LYDICK (P23330)

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Dated: September 23, 2008

STATE OF MICHIGAN
IN THE SUPREME COURT

UNITED STATES FIDELITY INSURANCE
& GUARANTY COMPANY,

Plaintiff-Appellee,

v

MICHIGAN CATASTROPHIC CLAIMS
ASSOCIATION,

Defendant-Appellant,

and

MICHAEL MIGDAL, Individually and as
Conservator of the Estate of DANIEL MIGDAL,
a Protected Person,

Defendant.

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PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF OAKLAND)

VERNITA M. RESST, being first duly sworn, deposes and says that on the 23rd

day of September 2008, she served 2 copies of Brief on Appeal – Amicus Curiae

Insurance Institute of Michigan and this Proof of Service on:

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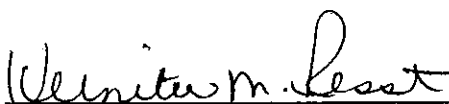
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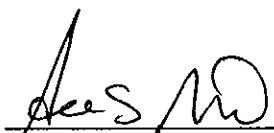
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by placing said documents in the United States mail, properly addressed, with full postage

prepaid thereon.


VERNITA M. RESST

Subscribed and sworn to before me
this 23rd day of September, 2008


AARON S. MARLOW, Notary Public
Wayne County, MI
(Acting in Oakland County, MI)
My Commission Expires: 12/14/11